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May 11, 2022

Meredith Montgomery
Clerk of Court
Alaska Supreme Court
303 K Street
Anchorage, AK 99501

Re: S-17965, *Yvonne Ito v. Copper River Native Association*

Dear Ms. Montgomery:

Attached to this letter are two pleadings filed in 4FA-22-01388CI. The first is a tribal consortium's motion to dismiss against a member tribe on the basis of the consortium's purported tribal sovereign immunity. The second is the member tribe's opposition. The motion is not yet ripe, so there is not yet published "authority" on the issue. *See* Alaska R. App. P. 212(c)(12). Instead of filing a notice of the superior court's decision on the eve of, or after, oral argument, this letter notifies this Court and the other parties of these pleadings now, to help inform how the parties' arguments might unfold in similar situations and to aid the conversation on June 20. The issues raised in these pleadings relate to many of the arguments in the State of Alaska's Amicus Brief, including those at pages 5 nn.19 & 20, 11 & n.42, 15–18, 24 n.91, 29–30 & n.109.

Sincerely,

TREG R. TAYLOR
ATTORNEY GENERAL

By: /s/ *Laura Wolff*
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

DOT LAKE VILLAGE,

Plaintiffs,

v.

DENA' NENA' HENASH d/b/a Tanana Chiefs Conference,

Defendant.

Case No. 4FA-22-01388 CI

LT 05/09/22

MOTION TO DISMISS WITH PREJUDICE
[Civil Rule 12(b)(1)]

Dot Lake Village ("Dot Lake") filed this lawsuit for declaratory and injunctive relief seeking to declare certain actions of the Board of Directors of Dena' Nena' Henash (the Tanana Chiefs Conference or "TCC") invalid and to compel TCC to take other actions. But this lawsuit cannot proceed here because TCC has tribal sovereign immunity from unconsented suit in State of Alaska courts, and TCC does not consent to this suit. TCC therefore moves for dismissal pursuant to Alaska Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

I. BACKGROUND

TCC is an Indian Self-Determination Act, Alaska Native inter-tribal consortium registered as an Alaska non-profit corporation. Indian Self-Determination and Education Assistance Act of 1975, P.L. 93-638, 88 Stat. 2203, Jan. 4, 1975 ("ISDEAA"). TCC is "the historic successor of the Tanana Chiefs Conference, the traditional consultative and governing assembly of the Athabaskan people of Interior Alaska, from time immemorial, and shall have all the rights, duties, powers, and privileges of this historic assembly."

Affidavit of TCC General Counsel Robin Brown ("Brown Aff.") ¶ 2, Ex. A (TCC Articles of Incorporation & Bylaws) at Art. V(f). TCC's purposes include "secur[ing] to the Alaska Native people of the region of the Tanana Chiefs Conference the rights and benefits to which they are entitled" under the laws of the United States and the State of Alaska, to "preserve the customs, folklore, art, and cultural values of the Native People" of the region, to "promote the common welfare of the Natives of Alaska and their physical, economic, and social well-being," *id.* Art. III, and to "provide a unified voice in advancing sovereign tribal governments through the promotion of physical and mental wellness, education, socioeconomic development, and culture of the Interior Alaska Native people," Tanana Chiefs Conference, *About Us*, https://www.tananachiefs.org/about/ (last visited Feb. 13, 2022).

TCC is an original signatory to the Alaska Tribal Health Compact with the United States Secretary of Health and Human Services and carries out federal programs for Alaska Natives, American Indians, and other eligible individuals, through agreements with the Indian Health Service and the Department of Interior Bureau of Indian Affairs, as authorized by, *inter alia*, the Indian Health Care Improvement Act, 25 U.S.C. §§ 1601 *et seq.*, P.L. 94-437, as amended, and ISDEAA Titles IV and V; Affidavit of Former TCC Vice President Charlene Stern ("Stern Aff.") ¶ 2, Ex. A (Compact); Brown Aff. ¶ 6. TCC is a constituent tribal organization of the Alaska Native Tribal Health Consortium ("ANTHC"), which operates the Alaska Native Medical Center in Anchorage and provides statewide health services to Alaska Natives and other eligible individuals. *See* Dep't of the Interior and Related Agencies Appropriations Act, 1998, PL 105–83, November 14, 1997, 111 Stat 1543 § 325. Pursuant to the Compact and TCC's Annual Funding Agreements with the United States Secretary of Health and Human Services, TCC built and operates the Chief Andrew Isaac Health Center, a state-of-the-art regional health clinic in Fairbanks, and provides health care, administrative services, and social services in villages throughout

the Interior Region.[1] Brown Aff. ¶¶ 5–8; Stern Aff. ¶ 2, Ex. B (Funding Agreement). TCC is defined as an Indian tribe by ISDEAA. *See* 25 U.S.C. § 5381(b).

TCC first registered as an Alaska non-profit corporation in 1962. Brown Aff. ¶ 2, Ex. A. But TCC has a much longer and storied history in the Interior Region. As noted above, the Traditional Chiefs of the Interior Athabascan villages have met together to address common problems "since time immemorial." In 1915, the Tanana Chiefs famously met in Fairbanks with United States District Judge James Wickersham, then Alaska's delegate to the United States Congress. The conference with Judge Wickersham signified the beginning of a formal relationship between the Interior Athabascan Tribes and the United States Government. At that meeting, the Tanana Chiefs negotiated with Judge Wickersham and firmly expressed their priorities: to sustain their villages by employment, lands protection, and access and management of tribal hunting and fishing resources—and, most importantly, education and health care. Tanana Chiefs Conference, *Our History*, https://www.tananachiefs.org/about/our-history/ (last visited April 13, 2022); *see, e.g.*, *Fairbanks N. Star Bor. v. Dena Nena Henash*, 88 P.3d 124, 134 (Alaska 2004) (describing Tanana Chiefs Conference's ISDEAA programs) ("The unique relationship between the federal government and Indian tribes has long led the government to provide support to tribes for health, education, employment, irrigation, administration, and real estate services."). The Tanana Chiefs, now organized as TCC, have fought for health care and other rights of the Interior Athabascan people ever since.

While currently registered as an Alaska nonprofit corporation, TCC is a traditional tribal organization to the core, and always has been, since long before the Tanana Chiefs met with Judge Wickersham. TCC is, in essence, the sovereign Interior Athabascan tribes acting together as they have for centuries. TCC is directed by, governed by, and

[1] In addition to operating the Chief Andrew Isaac Health Center, TCC provides primary care and other health care services at village clinics in the Alaska Native villages and communities of Alatna, Allakaket, Bettles (Evansville), Chalkyitsik, Circle, Dot Lake, Eagle, Hughes, Huslia, Kaltag, Koyukuk, Galena, Manley Hot Springs, Minto, Nenana, Northway, Nulato, Rampart, Ruby, Stevens Village, Tanacross, Tetlin, and Tok, Alaska.

accountable to its sovereign member tribes and tribal communities. TCC governance begins at the tribal and village level, with each member tribe and village electing a representative to TCC's forty-two member Board of Directors.

The Board of Directors meets annually to elect TCC's officers, including the President, Vice-President, and Secretary/Treasurer, sets TCC policy, and acts by resolution. In accordance with traditional Tanana Athabascan manners and customs, the Board of Directors meets at other times, as necessary, to discuss and resolve issues facing TCC and its member Villages. Brown Aff. ¶¶ 2, 4. The Board of Directors is broken down into six (6) subregions. *Id.* at ¶ 4. Each subregion designates a director to TCC's Executive Board of Directors, which includes TCC's officers. *Id.* The Executive Board of Directors exercises the authority of TCC's full Board of Directors in the management of TCC, except as limited in the bylaws. *Id.* at ¶¶ 2, 4. The full Board may remove any Board officer "whenever, in its judgment the best interests of the corporation would be served thereby," and it may sanction a Director that violates its Code of Ethics. *Id.*, Ex. A at Art. V, Sec. 3, Ex. B (Board Ethics Policy); Stern Aff. ¶¶ 2–3, Ex. B.

II. LEGAL STANDARD

Tribal sovereign immunity "is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 154 (1980). "[W]hen a tribal defendant invokes sovereign immunity in an appropriate manner and the tribe is entitled to such immunity, [Alaska] courts *may not exercise jurisdiction*." *Douglas Indian Ass'n v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1177 (quotations removed, emphasis in original).

Lack of jurisdiction due to tribal sovereign immunity is properly raised as a motion to dismiss for lack of subject matter jurisdiction under Alaska Rule of Civil Procedure 12(b)(1). TCC need only make a showing sufficient to support "a presumption of immunity." *Douglas Indian Ass'n v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 403 P.3d 1172, 1178–79 (Alaska 2017). A court may consider properly introduced, relevant matters outside of the pleadings on a 12(b)(1) motion. *See Healy Lake Village v.*

Mt. McKinley Bank, 322 P.3d 866, 871–72 (Alaska 2014) (affirming superior court's grant of motion to dismiss under Rule 12(b)(1)) (citing, *inter alia*, *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1038–39) (9th Cir. 2004)).

III. ARGUMENT

A. TCC's Member Tribes and Villages Are Entitled to Tribal Sovereign Immunity.

"As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Alaska courts have long recognized that "federally recognized tribes in Alaska are sovereign entities entitled to tribal sovereign immunity in Alaska state court" and look to federal law for procedural and substantive guidance on recognizing and applying that immunity. *Douglas Indian Ass'n*, 403 P.3d at 1176. "[W]hen a tribal defendant invokes sovereign immunity in an appropriate manner and the tribe is entitled to such immunity, [Alaska] courts *may not exercise jurisdiction.*" *Id.* at 1177 (quotations removed, emphasis in original).

Sovereign immunity attaches to those tribal entities recognized by the federal government. *Id.* at 1176; *McCrary v. Ivanof Bay Vill.*, 265 P.3d 337, 342 (Alaska 2011) (recognizing Alaska Native community of Ivanoff Bay Village as tribe for sovereign immunity purposes based on federal recognition); *Oertwich v. Traditional Vill. of Togiak*, No. 19-36029, __ F. 4th ___, 2022 WL 946518, at *5 (9th Cir. Mar. 30, 2022) ("[I]mmunity extends to Alaskan tribes even though they are organized as political entities rather than geographical areas or reservations."). TCC's members (among them Dot Lake Village) are recognized by the federal government and entitled to sovereign immunity. *See* Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 87 FR 4636-41 (Jan. 28, 2022). Acknowledging this status, a Fairbanks Superior Court has held TCC is "protected by tribal sovereign immunity" and not subject to suit in Alaska courts. *Beversdorf v. Tanana Chiefs Conf., Inc.*, No. 4FA1701911, 2017 WL 731341410, at *2 (Alaska Super. Ct. Sep. 27, 2017) (dismissing breach of contract case).

Because tribal sovereign immunity extends to TCC under ISDEAA and TCC acts as the "arm of [its constituent] tribes," the Court lacks subject matter jurisdiction in this matter and must dismiss.

B. Tribal Sovereign Immunity Extends to Alaska Tribal Health Organizations as "Arms of their Tribe"

TCC is not itself a "federally-recognized tribe" but is an inter-tribal consortium made up of individual federally-recognized Alaska Native Villages and several other tribal entities. *See* 25 U.S.C. § 5381(a)(5). But is well-established that tribes do not lose their sovereign status when acting through tribal organizations. because "[t]ribal sovereign immunity not only protects tribes themselves, but also extends to arms of the tribe acting on behalf of the tribe." *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014). As detailed in the facts section, TCC is the successor of a consortia of tribes dating since time immemorial. That alone should grant it sovereign immunity.

White considered whether the Kumeyay Cultural Repatriation Committee—an organization formed by 12 tribes to advance efforts to return indigenous remains and cultural items from public collections—was entitled to sovereign immunity in a suit brought by university faculty members. To determine whether the Repatriation Committee was an "arm of the tribe," *White* adopted a multi-factor test: "(1) the method of creation of the . . . entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities." *Id.* at 1025 (quoting *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)). The court set out that:

> the Repatriation Committee was created by resolution of each of the Tribes, with its power derived directly from the Tribes' sovereign authority. The Repatriation Committee is comprised solely of tribal members, who act on its behalf. [T]ribal representatives are appointed by each tribe. The process by which the Repatriation Committee designates the particular tribe to receive remains under NAGPRA is defined and accepted by the Tribes. The Repatriation Committee is funded exclusively by the Tribes. As the district

> court noted, the whole purpose of the Repatriation Committee, to recover remains and educate the public, is "core to the notion of sovereignty." Indeed, "preservation of tribal cultural autonomy [and] preservation of tribal self-determination," are some of the central policies underlying the doctrine of tribal sovereign immunity.
>
> Given these undisputed facts, the district court properly concluded that the Repatriation Committee was an "arm of the tribe" for sovereign immunity purposes. . . .

Id. (internal citation omitted).

Here TCC plainly qualifies for sovereign immunity even without any specific federal statutory interplay. It is composed of and controlled by tribal members to provide technical assistance and accomplish mutually beneficial goals amongst the region's tribes. It furthers cultural projects and self-governance initiatives "core to the notion of sovereignty." There is simply no straight-faced basis to conclude TCC is anything but an "arm of the tribes" that formed it.

If there is not enough, a cascade of courts have agreed to this principle in varying specific situations. Alaska federal district court decisions applying *White* have uniformly held tribal health organizations like TCC have tribal sovereign immunity from suit. In *Barron v. Alaska Native Tribal Health Consortium*, a former ANTHC employee filed disparate treatment and retaliation employment claims against the consortium. 373 F. Supp. 3d 1232, 1236 (D. Alaska 2019). And in *Wilson*, two plaintiffs alleged retaliation and wrongful termination after they opposed medical billing practices they considered fraudulent. 399 F. Supp. 3d at 930. In both cases, the United States District Court for the District of Alaska held ANTHC was immune from suit and tribal sovereign immunity required dismissal. As the Court set out in *Barron*:

> ANTHC's creation was authorized pursuant to a federal law intended to promote tribal self-sufficiency. And . . . ANTHC receives federal funding to conduct activities that benefit tribe members. The factors identified in White also indicate that ANTHC is entitled to sovereign immunity. ANTHC was formed by Alaska Native tribes. By "entering into self-determination and self-governance agreements" with the [Indian Health Service], ANTHC provides and manages health services that benefit members of Alaska Native tribes. The structure of ANTHC's board places control over the ANTHC's

> ownership and management in representatives of the Alaska Native tribes. . . . ANTHC's purpose — entering into "self-determination and self-governance agreements" — is "core to the notion of sovereignty." Finally, ANTHC receives federal funding to carry out governmental functions critical to Alaska Native tribes.

373 F. Supp. 3d at 1239. The *Wilson* court agreed, engaging in a detailed factor-by-factor analysis that noted ANTHC "supplants the government by providing statewide health services that were formerly provided by the [Indian Health Service]" and facilitates the "unique tribal cooperation that has developed in Alaska to assure that all Alaska Natives have access to a comprehensive, integrated, and tribally-controlled health care delivery system." 399 F. Supp. 3d at 935–37. *Barron* and *Wilson* are notable beyond merely applying *White* in Alaska. TCC was statutorily authorized to form ANTHC with fourteen other tribal regional health entities in 1997 and maintains a seat on its Board of Directors by statute. 111 Stat 1543 § 325(a-b). When *Wilson* noted that ANTHC was "formed by Alaska Native Tribes" and that "[t]he structure of ANTHC's board places control over the ANTHC's ownership and management in representatives of the Alaska Native tribes," it was referring (in part) *to TCC and its member tribes.* If ANTHC is immune from suit as an "arm of the tribes," the underlying regional organizations that represent "the tribes" must also be immune.

Consistent with *Barron* and *Wilson*, the federal court in *Cole v. Alaska Island Cmty. Servs., et al.* dismissed a suit against Southeast Alaska Regional Health Consortium ("SEARHC"), holding the claims barred by tribal sovereign immunity. No. 1:18-cv-00011-TMB, slip op. at 13–15 (D. Alaska Oct. 11, 2019); (attached as Ex. A). *Cole* involved an antitrust action related to consumer prescription pricing in Wrangell. SEARHC was "an 'inter-tribal consortium' comprised of fifteen federally-recognized tribes of Southeast Alaska created by tribal resolutions; was governed by a Board of Directors comprised of elected and appointed members from its constituent tribes that intended to share their sovereign immunity with SEARHC and managed Indian Health Service" funding. *Id.* at 13–14. The court held SEARHC's purpose of developing and maintaining health programs for Alaska Native people in its region, as established in its

By-Laws, sufficiently supported its "arm of the tribe" status over objections that SEARHC also provided services to non-Native Alaskans. *Id.* at 14–16. The court dismissed and the Ninth Circuit affirmed. *Id.*; *Cole v. Alaska Island Cmty. Servs.*, 834 F. App'x 366, 367 (9th Cir. 2021) ("The district court properly dismissed Cole's claims against [SEARHC] and Alaska Island Community Services because those claims are barred by tribal sovereign immunity."). Yet another federal court concluded the same in *Matyascik v. Arctic Slope Native Ass'n, Ltd.*, No. 2:19-CV-0002-HRH, 2019 WL 3554687 (D. Alaska Aug. 5, 2019), an employment suit against the hospital run by the Arctic Slope Native Association.

None of these cases were close calls. And there is nothing different between them and this matter. The Court should likewise hold TCC has tribal sovereign immunity from suit in Alaska courts and must be dismissed for lack of subject matter jurisdiction.

C. TCC is an "Arm of the Tribes" and Holds Tribal Sovereign Immunity Under the *White* Factors.

Like in *Cole*, *Wilson*, *Barron*, and *Matyascik*, every pertinent fact here weighs in favor of TCC's tribal sovereign immunity from suit in Alaska courts. *First*, TCC's "method of creation" demonstrates it is an "arm of the tribes." *White*, 765 F.3d at 1025. TCC is the continuation of the Conference of the Traditional Chiefs of the Interior Athabascan villages, who have met together to address common problems "since time immemorial." TCC has continued without interruption the Tanana Chiefs' historical work advocating for the rights of Interior Alaska's Native people. TCC's incorporating documents, filed by incorporators from villages throughout the region, memorialize that it is "the historic successor of the Tanana Chiefs Conference, the traditional consultative and governing assembly of the Athabaskan people of Interior Alaska, from time immemorial, and shall have all the rights, duties, powers, and privileges of this historic assembly." Brown Aff. ¶ 2, Ex. A at Art. V, (f). This history weighs strongly in favor of finding TCC's holds tribal sovereign immunity.

Second, TCC's explicit purpose in incorporating was for tribal purposes. It was formed to "secure to the Alaska Native people" of the region "the rights and benefits to

which they are entitled under the laws of the United States and the State of Alaska," to "preserve the customs, folklore, art, and cultural values of the Native People" of the region, and to "promote the common welfare of the Natives of Alaska and their physical, economic, and social well-being." *Id.*, Ex. A at Art. III, (a), (c), (e). Again, there is no question this factor weighs in favor of TCC's status as a tribal entity with sovereign immunity.

Third, TCC's "structure, ownership, and management" is entirely controlled by its tribal members. Its incorporating documents specify that its membership was limited to "Native villages of the region claimed by the Dena' Nena' Henash . . . and to urban Native groups consisting of Athabascans of one-quarter blood or more, as fully defined in the by-laws." *Id.*, Ex. A at Art. V, (a). Its full Board of Directors consists of 42 elected members of TCC's tribes, with a subset of members making up its Executive Board. Ex. A at Art. II, Sec. 3(b); Art. VII, Sec. 1. The Executive Board also includes TCC's Traditional Chief—an Elder and ambassador of traditional knowledge and Athabascan culture—as an ex officio member. *Id.*, Ex. A at Art. VII, Sec. 1, 4. TCC's "structure, owner, and management" are entirely and distinctly tribal and support a finding of tribal sovereign immunity. *See id.* ¶¶ 3–10, Exs. A–B.

Fourth, the intent of the tribes that incorporated TCC to extend their sovereign immunity to their joint enterprise is apparent in TCC's founding documents. TCC was vested with "the rights, duties, powers, and privileges" of the "Tanana Chiefs Conference, the traditional consultative and governing assembly of the Athabaskan people of Interior Alaska, from time immemorial." *Id.*, Ex. A at Art. V, (f). Moreover, one of TCC's core functions is being party to multiple ISDEAA compacts and contracts in support of its member Villages. Each of those contracts extends the contracting tribe's sovereign immunity to TCC as a matter of law. 25 U.S.C. § 5381(b). The Tribes that formed TCC intended to extend their sovereign immunity from suit onto it, and TCC has consistently asserted tribal sovereign rights in state and federal courts. *See, e.g.*, Brief for Tanana Chiefs Conference, as Amicus Curiae, *Douglas Indian Ass'n*, 403 P.3d 1172, 2016 WL 7655910

(Alaska 2016); Brief for Tanana Chiefs Conference, as Amicus Curiae, *Cole*, 834 F. App'x 366, 2020 WL 3088589 (Alaska 2020).

Fifth, the financial relationship between TCC and its members weighs heavily in favor of sovereign immunity. TCC receives federal funding from the "tribal shares" attributed to each member Village to operate federal ISDEAA programs on their behalf.[2] TCC uses the Villages' tribal shares to provide traditional government services for its member Villages, including health care, education, child welfare programming, legal support, and tribal administration and assists the Villages in generating additional revenue to achieve those same goals. Indian Health Care Improvement Act, Section 206, 25 U.S.C. § 1602e; Brown Aff. ¶¶ 2–8, Exs. A–B. TCC unquestionably acts as an arm of the tribes in its financial activities. *Barron*, 373 F. Supp. 3d at 1240; *Wilson*, 399 F. Supp. 3d at 936 (under *White*'s financial relationship factor, tribal consortium's "financial relationship with the tribes weighs in favor of a finding that it is 'an arm of the tribe.'").

White was not an ISDEAA case, but rather examined whether a tribal organization is entitled to the sovereign immunity held by its underlying tribes as a matter of federal common law. Here, like in *White* and a list of Alaska cases applying it, TCC is an Alaska Native intertribal organization entitled to the same sovereign immunity as its members. The Court should so hold and dismiss for lack of subject matter jurisdiction.

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[2] *See* 25 U.S.C. § 5388(a) (transfer of federal funds to tribes and tribal organizations pursuant to Compact and Annual Funding Agreements), (c) ("The Secretary shall provide funds under a funding agreement under this subchapter in an amount equal to the amount that the Indian tribe would have been entitled to receive under self-determination contracts under this subchapter."); 25 U.S.C. § 5361(12) (definition of "tribal share") ("The term 'Tribal share' means the portion of all funds and resources of an Indian Tribe that-- (A) support any program within the Bureau of Indian Affairs, the Office of the Special Trustee for American Indians, or the Office of the Assistant Secretary for Indian Affairs; and (B) are not required by the Secretary for the performance of an inherent Federal function."); 25 U.S.C. § 5381(a)(12) ("The term "tribal share" means an Indian tribe's portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) that are not required by the Secretary for performance of inherent Federal functions."); *see also Wilson*, *supra.*, at 936 (Alaska tribal consortium relies for funding "on 'tribal shares' authorized under ISDEAA for the benefit of Alaska Native people.").

D. TCC is Immune From Suit Under ISDEAA, 25 U.S.C. § 5381(b).

In addition, because this action challenges actions that are part of TCC's implementation of "programs, functions, services, and activities" under its ISDEAA Title IV and V Compacts and Funding Agreements with the United States, TCC holds the "rights and responsibilities" of its member tribes, including tribal sovereign immunity from unconsented suit:

> In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this subchapter, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this subchapter). In such event, the term "Indian tribe" as used in this subchapter shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

25 U.S.C. § 5381(b); Stern Aff. ¶ 2, Ex. B at § 10. In short, under ISDEAA tribes can form inter-tribal consortiums to carry out what they could otherwise do individually, if they deem appropriate. Under § 5381(b), the individual tribes' legal rights and responsibilities flow through to the inter-tribal consortium. Those "rights" include tribal sovereign immunity from unconsented suit. TCC, a 42-member intertribal consortium, may assert (as it does here) that immunity.

The vast majority of TCC's funding is provided through a Funding Agreement with the Secretary of the Interior. Stern Aff. ¶ 3. TCC's funding is administered under the direction and review of TCC's Board. *Id.* The Funding Agreement Provides, in relevant part:

> **3.5.1 Board of Directors.** All programs are provided under the direction of the TCC Board of Directors, which provides policy, administrative, and executive direction and review, as a full Board, and through the Executive Board, Health Board, and other advisory boards, and through the leadership and direction of the President/Chairman of the Board, who is the chief executive officer of TCC.

> **3.5.2 Executive Direction.** The President/Chairman of the Board and administrative departments of TCC provide direction, administrative support, and technical assistance in support of all of the PSF as described in this Funding Agreement, including legal, financial, and administrative support, administrative compliance, quality management, and patient advocacy.

Stern Aff. ¶ 2, Ex. B at § 3.5.

During P.J. Simon's tenure as President, it became apparent to members of the Board that Mr. Simon's actions were contrary to the Board's direction and imperiled TCC's ability to carry out its obligations under the Funding Agreement. *Id.* ¶ 4. As described in the Complaint, the Board took steps necessary to preserve TCC's mission and mandate, including removal of Mr. Simon as President. *Id.* ¶¶ 4–6.[3]

Congress' declaration in 25 U.S.C. § 5381(b) that inter-tribal consortia such as TCC have the rights of their constituent tribes while operating ISDEAA programs is controlling

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[3] *See, e.g.*, *Ito v. Copper River Native Ass'n*, No. 3AN-20-06229CI, Order Granting Case Mot. No. 1, at 11 (Alaska Super. Ct. Dec. 2, 2020):

> [B]ecause Defendant raises a Civil Rule 12(b)(1) jurisdictional defense, the court may consider extrinsic evidence outside the face of the pleadings. Defendant establishes that is it an inter-tribal consortium organized under P.L. 93-638 in its memorandum supporting its 12(b)(1) motion to dismiss. Accordingly, under 25 U.S.C. § 5381(b), Defendant has the same rights as its authorizing tribes—as it is not disputed that an Indian tribe has the right to assert tribal sovereign immunity, Defendant is legally entitled to assert tribal sovereign immunity as a P.L. 93-638 inter-tribal consortium.

(footnotes omitted) (dismissing action against ISDEAA tribal health consortium based on 25 U.S.C. § 5381(b)) ("federal common and statutory law "grant [CRNA] the discretion to assert tribal sovereign immunity as though it were a tribe itself."); *see also Bekkum v. Samuel Simmonds Mem'l Hosp.*, No. 2BA-15-97 CI (Alaska Super. Ct. June 19, 2015) and *Mattoni v. Alaska Island Cmty. Servs. Inc.*, No. 1JU-18-715 CI (Alaska Super. Ct. June 30, 2019); *see also Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188–89 (9th Cir. 1998) (finding that a consortium of Indian tribes organized as a non-profit corporation for the purposes of self-determination under P.L. 93-638 retained the sovereign immunity of its constituent tribes).

and dispositive of this matter. *E.g.*, *Ito*, No. 3AN-20-06229CI, supra. ("The [United States] Supreme Court has described 'Congress's authority over Indian affairs as 'plenary and exclusive.'"). This Court has previously found TCC is a tribal organization with sovereign immunity:

> The Indian Self-Determination and Education Assistance Act of 1975 (P.L. 93-638) defines "tribal organization" as the recognized governing body of any Indian tribe, any legally established organization of Indians which is controlled, sanctioned or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities. Congress and the Executive branch have declared tribal organizations under P.L. 93-638 to be "Indian tribes" with the rights and responsibilities of the Indian tribes authorizing the organization. The record is clear that TCC is exactly the type of tribal organization encompassed by P.L. 93-638.

Beversdorf, No. 4FA1701911, 2017 WL 731341410, at *2. The Court should find so again in this matter.[4]

IV. CONCLUSION

TCC is an intertribal consortium that is the successor of a consultative body acting in the interests of the Native People of Interior Alaska "since time immemorial." As a matter of federal tribal sovereign immunity law and explicitly under the Indian Self-

[4] Additionally, at its core this suit arises from a disagreement about internal TCC governance issues between Dot Lake, one of TCC's member tribes, and TCC's other member tribes. TCC is considered an Indian tribe under ISDEAA, 25 U.S.C. § 5381(b). Absent explicit waivers, intratribal disputes are not the purview of Alaska's courts and fall outside of state court subject matter jurisdiction. *See Healy Lake Village v. Mt. McKinley Bank*, 322 P.3d 866, 874–78 (2014) ("[T]he state has no interest in determining the outcome of this internal tribal dispute . . . [and the dispute] remains within the tribe's retained inherent sovereign powers.") (internal quotation marks omitted); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) ("[R]esolution in a foreign forum of intratribal disputes . . . cannot help but unsettle a tribal government's ability to maintain authority.").

Determination and Education Assistance Act, TCC is immune from suit in Alaska courts absent explicit waiver, and this suit must be dismissed for lack of subject matter jurisdiction.

DATED: April 22, 2022

LANE POWELL LLC
Attorneys for Defendant

By _____
Brewster H. Jamieson, ABA No. 8411122

I certify that on April 22, 2022, a copy of the foregoing was served by email on:
Michael J. Walleri, mwalleri@fairbankslaw.com

Rachel Roath

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

DOT LAKE VILLAGE, - Plaintiff, vs. DENA' NENA' HENASH d/b/a Tanana Chiefs Conference - Defendant.	CASE NO. 4FA-22-01388 CI **OPPOSITION TO TCC MOTION TO DISMISS- SOVERIEGN IMMUNITY**

INTRODUCTION

Dot Lake, a federally recognized tribe, has brought suit against Tanana Chiefs Conference seeking declaratory and injunctive relief alleging that TCC took a number of actions in violation of the TCC Bylaws, including illegally convening a special full board meeting of TCC Directors, illegally recalling the President and illegally ejecting Directors from various meetings, including the special full board meeting. TCC asserts a claim of sovereign immunity but fails to disclose to this Court that its claim is contrary to precedence binding upon this Court. Rather, TCC seeks to invoke federal case law, but in doing so presents a revisionist and incorrect history of TCC in support of such claim. Once the true facts are understood, TCC may not assert sovereign authority under the cited federal case law. Even if TCC were able to assert sovereign immunity, that immunity does not operate against a member tribe because of the superior sovereign and *ultra vires* exceptions to the doctrine of sovereign immunity.

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I. STANDARD FOR DISMISSAL- SOVERIEGN IMMUNITY.

Whether TCC is protected by tribal sovereign immunity, is a question of law, governed by the available evidence before the Court and applying the law that is most persuasive in light of precedent, reason, and policy. *Runyon v Association of Village Council Presidents,* 84 P.3d 437 (Alaska, Jan 30, 2004)

II. FACTS.

TCC's factual assertions are long on myth/rhetoric and short on objective reality. In summary, TCC claims to be an "arm of the tribes of Interior Alaska" because it was 1) created by Indian tribes to operate tribal programs; 2) it is controlled by the tribal governments, and 3) that the tribes intended to extend their sovereign powers, including immunity from suit to TCC.[1] Additionally, TCC argues that it took the actions at issue to preserve TCC's mission and mandate.[2] While TCC's narrative may be seductively romantic, it is not accurate. As with most things in life, the facts are much more complicated.

a) TCC Was Not Created By Tribes. Interior Athabascan villages have a long history of meeting for trade at specific locations. For example, Tananian Athabaskans

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[1] TCC Motion to Dismiss, pp 1-4 & 9-11
[2] Id., at 13

would meet for trade at Nuklakayet,[3] while Gwitchin Athabascans would meet for trade at Gwitchyaa Zhee,[4] and Koyukon Athabascans would meet at Nulato.[5]

In 1904 Judge Wickersham found that the federal government had an affirmative obligation to protect aboriginal land occupancy, which was followed by a similar ruling in 1914.[6] In response to these developments, in 1915, Judge Wickersham met with representatives (Chiefs) from Tanana (or Ft. Gibbon), Crossjacket, Tolovana, Minto, Chena, and Salchaket, to discuss land issues.[7] However, it is important to note that this meeting was only with six (6) villages located in the Tanana River drainage, hence the reference to the meeting as a meeting with the Tanana Chiefs. It is also important to note, that there is no record of any general meeting of the Athabascan villages within the current regional boundaries of TCC prior to 1962. The idea that the Athabaskan villages within the current TCC/Doyon region historically and traditionally operated a consultive or other governing group is not supported by any evidence in the record and is simply not true.

[3] Near present day Tanana. See ALASKA NATIVES AND THE LAND, at 212-213 (Federal Field Committee for Development and Planning in Alaska- October 1968)

[4] Near present day Fort Yukon. See ALASKA NATIVES AND THE LAND *supra,* at 206

[5] *Ala* ALASKA NATIVES AND THE LAND *supra.*, at 197-198

[6] U.S. v Berrigan, 2 Alaska Rpts. 442 (D Alaska, 1904); *U.S. v Cadzow,* 5 Alaska Rpts. 125 (D Alaska, 1914);

[7] See https://www.tananachiefs.org/about/our-history/. TCC's website suggests that the meeting was "to protect a burial ground, however, the meeting was also about generally protecting Native land rights within the Tanana River drainage, which was experiencing large incursions of non-Native settlement in the Tanana River drainage. See Transcript from a conference with the Tanana Chiefs, 1915, excerpted from Alaska Journal, Spring 1971 at Grabinska, HISTORY OF EVENTS LEADING TO THE PASSAGE OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT (Tanana Chiefs Conference, Inc., 1983) (Plt. Ex. 1)

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In 1962, TCC was organized as an unincorporated association when "A number of people in Fairbanks and Nenana got together and discussed the sure and gradual loss of the Native land around the homes of people present at the meeting."[8] The first meeting was held in Nenana in early March attended by 10 village representatives.[9] Building on the traditions of Nuklakayet trade meetings, a second meeting was held at Tanana in June, 1962, which was attended by thirty (30) villages.[10] "The main motive for the meeting was the land problems. Other topics under discussion included hunting, trapping, and fishing rights, as well as educational needs."[11] During this period, TCC was essentially a grass roots land claims advocacy and lobbying group.

TCC was incorporated as a state chartered non-profit corporation on September 27, 1971 by three Native individuals: i.e. Alfred R. Ketzler, Ruby John and Tim Wallis.[12] Nothing in the Articles of Incorporation mentioned any tribe or tribes. Rather, the Articles of Incorporation talk about Native villages and "urban Native groups."[13] Over the years, this has not changed. TCC's Articles of Incorporation have been amended and restated, however, they still do not mention or use the word "tribe".[14] Rather, TCC's Restated Articles of Incorporation expand membership to allow other "Villages and

[8] Statement of Alfred Ketzler, President of Tanana Chiefs Conference. Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives, Ninety-first Congress First Session on H.R. 13142, H.R. 10193, and H.R. 14212, Bills to Provide for the Settlement of Certain Land Claims of Alaska Natives, and for Other Purposes. U.S. Government Printing Office, 1970.

[9] Id.

[10] Id.

[11] Id.

[12] See Original TCC Art. Of Incorporation (attached as Ex. 2)

[13] Id. at Art. IV(a)

[14] See TCC Restated Articles of Incorporation and Bylaws (Def. Ex. A – 2nd Attached to TCC Memo) at Art. IV(a)

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Native Groups" that may apply for membership.[15] The simple fact is that TCC was not incorporated by federally recognized tribes acting in their tribal capacity. TCC was incorporated by Native individuals, acting in their individual capacities, and extending membership to "villages" and "Native groups", without regard or reference to any claimed status as a recognize or unrecognized Indian tribe.

Equally, the Bylaws of TCC do not make reference to Tribes.[16] Moreover, the purposes of TCC, as stated in its original Articles of Incorporation, and Restated Articles of Incorporation, make no reference to tribes, being an arm of any tribal government, nor the operation of tribal programs/ functions, nor any relationship to tribes.

The Articles of Incorporation state that TCC is "organized exclusively for religious, charitable, scientific, literary or educational purposes within the meaning of Section 501 (c) (3) of the Internal Revenue Code."[17] And of course, TCC has not sought to be political subdivision of a tribal government under the Indian Tribal Government Tax Status Act. (ITGTSA) 26 U.S.C. 7871.[18] The ITGSTA provides;

> a subdivision of an Indian tribal government shall be treated as a political subdivision of a State if (and only if) the Secretary determines (after consultation with the Secretary of the Interior) that such subdivision has been delegated the

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[15] Id.
[16] Id. Bylaws, at II, § 1
[17] See TCC Restated Articles of Incorporation and Bylaws (Def. Ex. A – 2nd) at Bylaws, Art. III (j)
[18] The ITGSTA provides;
a subdivision of an Indian tribal government shall be treated as a political subdivision of a State if (and only if) the Secretary determines (after consultation with the Secretary of the Interior) that such subdivision has been delegated the right to exercise one or more of the substantial governmental functions of the Indian tribal government. 26 USC 7871(d)

> right to exercise one or more of the substantial governmental functions of the Indian tribal government.

Of course, being treated as a governmental political subdivision would be more advantageous than a § 501(c)(3) corporation. If TCC were, in fact, a tribal agency, it would have this different tax status. Thus, it would appear that TCC is not claiming to be a tribal organization for tax purposes.

As an objective historical fact, TCC and similar native non-profit regional entities were not organized in order to advance any tribal agenda; rather they were incorporated in anticipation of the passage of the Alaska Native Claims Settlement Act (ANCSA), which passed in December, 1971.[19] ANCSA authorized "existing" Native Associations to incorporate the Regional Corporations that would receive land and money under the terms of ANCSA.[20] TCC was one of the last of these Native associations to incorporate.[21] However, by incorporating prior to the ANCSA's passage, it would qualify as "existing" for the purposes of §1606(d), and had the exclusive right under the statute to organize the ANCSA Regional Corporation that would become Doyon, Ltd. TCC was referenced in ANCSA, but not as a tribe or tribal organization. Rather, TCC needed was referenced as a Native association authorized to incorporate an ANCSA regional Native corporation for Interior Alaska.[22] Thus, TCC's incorporation was not intended to create a "tribal

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[19] 43 U.S.C. 1601 et. seq.
[20] 43 U.S.C. § 1606(d). For a comparative description of the organization of these regional Native Associations, See Case, ALASKA NATIVES AND AMERICAN LAWS, 2d Ed., pp 338-353(UA Press, 1984)
[21] See Case, *supra.*
[22] 43 USC §1606

organization", rather it was incorporated as a necessary part of ANCSA implementation. It was not incorporated further tribal functions.

Of course, one of the reasons that TCC could not have been incorporated by federally recognized tribes is that in 1971 there were few or no federally recognized tribes in Interior Alaska. As noted above, TCC was organized as an unincorporated entity prior to the passage of ANCSA and was incorporated shortly prior the enactment of ANCSA. But Congress did not recognize Alaska Native villages or groups as Indian tribes until the passage of ANCSA.[23] Given that TCC was organized before any TCC members were federally recognized as Indian tribes it would be factually incorrect to suggest that TCC was organized by federally recognized Tribes.

Nor was TCC organized as part of the federal government's program of Indian Self-Determination, which did not commence until after the passage of the Indian Self-Determination and Educational Act (ISDEAA) in 1975.[24] That legislation was not passed until over four years after TCC was organized. Thus, TCC could not have been incorporated with the intent to serve as a tribal organization under the ISDEAA, because those rights did not exist until four years after TCC's incorporation. Rather, the most that

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[23] Alaska Native groups were first recognized by Congress as part of the passage of the Alaska Native Claims Settlement Act on December 18, 1971. See *Noatak v Hoffman,* 872 F.2d 1384, 1387-1378 (1991). Subsequent action by Congress continued to recognize this status.

[24] P.L. 93-638 (25 USC § 5301 et. seq.)

can be said with is that after the passage of the ISDEAA,[25] TCC was repurposed to operate social service, health and other services to Native people under the ISDEAA.[26]

b) TCC Does More Than Operate Self-Determination Programs. TCC is a large and complicated organization. TCC's motion emphasizes that it operates as a "tribal organization" for contracting and compacting under the ISDEAA. [27] While the ISDEAA is an important part of TCC, the Defendant is much more. For example, TCC operates a number of state contracted services, such as the Village Public Safety Officer (VPSO) program,[28] and education programs.[29] TCC leases commercial office space to various non-profit's and operates "an alcohol-free Native community center and potlach hall, that is also leased for weddings, funerals and other Native social events.[30] TCC operates a state licensed Bingo hall with Fairbanks Native Association, and Athabascan Fiddlers Association.[31] TCC engages in other kinds of governmental contracting with the BLM for cadastral surveying, and with private landowners for timber management. [32] These activities require the sanction of any tribal government and are clearly beyond any tribal purposes.

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[25] 25 USC § 5423
[26] Case, ALASKA NATIVES AND AMERICAN LAWS, 2d Ed., pp 338-345(UA Press, 1984)
[27] 25 USC 5423 See Def. Aff't of Charlene Stern (unlabeled affidavit submitted with TCC's Motion to Dismiss)
[28] Case, supra, at 345
[29] Id., at 343
[30] *Dená Nená Henash v. Fairbanks North Star Borough*, 265 P.3d 302, 305- 307 (Alaska 2011)
[31] https://www.commerce.alaska.gov/cbp/businesslicense/search/License
[32] Case, at 344

c) Tribes' Have Not Delegated Sovereign Powers To TCC. TCC has provided no evidence that any federally recognized tribe has delegated to TCC any sovereign powers, including sovereign immunity. The resolution by Dot Lake entering the TCC Health Compact is an excellent example.[33] The resolution, passed in 1994, merely "authorizes Tanana Chiefs Conference, Inc. to enter into a compact of Self-Governance and related funding agreement with the Indian Health Service as allowable under P.L. 100-472." In other words, TCC was only authorized to provide services under a federal government compact. TCC was not delegated any authority relative to tribal programs, services or powers. The resolution does not denominate TCC as a subdivision of the tribe. It does not delegate any sovereign powers to TCC.[34] Recently, the tribe clarified this lack of any delegation of sovereign powers to TCC, including a clarification that it has not delegated sovereign immunity to TCC .[35]

d) TCC Members Are Not Composed Exclusively of Indian Tribes. While TCC's members include federally recognized Indian tribes, such as the Plaintiff, the membership of TCC[36] includes state chartered non-profit corporations (Fairbanks Native Association, and Tok Native Association) as well as "villages" that are not recognized as

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[33] See 1994 Dot Lake Resolution authorizing TCC to Compact (Plt. Ex. 3)
[34] As a general matter, the Tribe's sovereign powers include the right to determine its form of government, power to determine membership, power to legislate and tax, power to administer justice, and the power to exclude persons from tribal territory. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, at §4.0[2] (2005 ED.). The Dot Lake resolution makes no mention of any of these types of sovereign powers.
[35] See 2022 Dot Lake Resolution (Plt. Ex. 4)
[36] The current list of TCC members may be found at https://www.tananachiefs.org/about/communities/

Indian tribes (e.g. Lake Minchumina, Medfra, and Canyon Village).[37] Of the 41 members of TCC, five (5) are not federally recognized Tribes. The simple fact is that TCC membership is not composed exclusively of federally recognized Indian tribes.

e) The Tribes Are Not Responsible for TCC's Obligations Either Generally or In the Event of A Money Judgment Against TCC. Of course, TCC members who are Tribes are not responsible for TCC obligations. A.S. 10.20.051(b) (members of corporation not liable on corporation liabilities). Of course, this suit does not seek money damages. The suit is a declaratory and injunctive relief. If there was a possibility of a money judgment, Tribal members would not be responsible for an award of money damages against TCC.

f) The Tribes Do Not Have Control Of TCC. TCC argues that tribes control TCC, which is not actually true. Normally, the ISDEAA allows tribes to contract/compact for operation of programs, functions, services, and activities performed by the Indian Health Service for the benefit of Indians because of their status as Indians. 25 USC §§5321 & 5384. It is under these provisions that TCC contracts and compacts with the BIA and IHS. However, Alaskan Tribes have lost the ability to self-determine whether TCC should contract/compact for the operation of Indian Health Services for the benefit of its tribal citizens. Currently, the IHS takes the position that

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[37] See Fed. Reg. Vol. 83, p. 34863 (July 23, 2018) (See https://www.gpo.gov/fdsys/pkg/FR-2018-07-23/pdf/2018-15679.pdf) The appearance of the Village on this list is determinative of Dot Lake's tribal status. See *John v. Baker*, 982 P.2d 738 (Alaska 1999)

> Currently Alaska is subject to congressional limitations on funding and contract under the Alaska Moratorium. The moratorium provides that, notwithstanding any other provision of law, IHS may not disburse funds for the provision of health care services pursuant to Public Law 93-638 (25 U.S.C. 450 et seq.) to any Alaska Native Village or Alaska Native village corporation that is located within the area served by an Alaska Native regional health entity. § 424(a), 128 Stat. at 343. [38]

In other words, Dot Lake cannot withdraw from the Compact and contract for the operation of these services itself. Dot Lake, and most of the other Tribes in the TCC compact are captives within the Compact and cannot engage in self-determination with regard to IHS compacting. Thus, Dot Lake and the other TCC tribes cannot control TCC with regard to the basic choice as to whether the Tribe or TCC shall perform these services.

Tribal control of TCC is a central disputed question in this lawsuit. TCC argues that it is controlled by the Tribes by processes set forth in its bylaws. While it is true that the bylaws provide that each tribe has a Director that sits on the board with several non-tribal directors, the complaint and the supporting affidavits in this matter allege that TCC is taking numerous actions in violation of those bylaws, including conducting meetings without proper notice, denying directors the right to be present at meetings, denying director the right to vote on matters before the Board, and removing the President in a manner inconsistent with the Bylaws.[39] If TCC is not complying with its governing

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[38] See E-mail Fox to Fremin & Charles (March 9, 2022) (Plt. Ex. 5)
[39] See Aff't of Carl Burgett (2) (Plt. Ex. 6& 7), Ms. Georgianna Madros Plt. (Ex. 8), Ms. Tracy Charles (Plt. Ex. 9) and Mr. PJ Simon, (Plt. Ex. 10) discussed below. See also, Louden Letter Plt. (Ex. 11)

bylaws which provide for tribal control, it cannot be said that the tribes actually control TCC.

g) The Recall of PJ Simon Was To Cover Up Financial Corruption. TCC makes vague and indecipherable statements as to the reason for the removal of PJ Simon. These statements are largely pre-text. The dispute regarding Mr. Simon had to do with the fact that Mr. Simon believed that there was corruption and/or mismanagement with regard to TCC's multi-million dollar clinic construction program which involved violation of applicable federal procurement regulations. Mr. Simon was raising these issues to the TCC Executive Board and the Full Board and was proposing a corrective action plan to bring TCC into compliance with federal laws and regulations.[40]

III. TCC DOES NOT POSSESS SOVERIEGN IMMUNITY UNDER *RUYNON*.

TCC's claim to sovereign immunity is wholly inconsistent with the Alaska Supreme Court's holding in *Runyon ex rel. B.R. v. Association of Village Council Presidents*, 84 P.3d 437 (Alaska, 2004), which is binding precedent on this Court and was not mentioned by TCC in its briefing before this Court.[41] In *Runyon* the Court rejected a sovereign immunity claim from a regional Native non-profit corporation serving as a

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[40] See Aff't of Mr. PJ Simon, (Plt. Ex. 9)

[41] TCC is clearly aware of the *Runyon* case. Prior to filing its motion in this case, TCC intervened in *Ito v Copper River Native Ass'n*, Case No. S17965 (pending Ak Supreme Ct.), arguing that the Alaska Supreme Court should overturn *Runyon*. *See https://appellate-records.courts.alaska.gov/CMSPublic/Case/Docket?q=w6sobc/DATexobB6lxhJPQ==%27*

"tribal organization" for ISDEAA purposes similar to TCC. The corporation in *Runyon* (i.e. AVCP) differed from TCC in that all the members of AVCP are federally recognized tribes, whereas TCC's membership includes non-tribal entities. Nonetheless, in *Runyon* the Court held that the regional Native non-profit does not generally possess sovereign immunity. The Court held that "whether the entity is formed by one tribe or several, it takes on tribal sovereign immunity only if the tribes or tribes... are the real parties in interest." 84 P.3d at 440.

a) *Real Party In Interest*. Determining whether one or more tribe is the real party in interest involves a critical inquiry: i.e. whether the tribe(s) are legally responsible for the entities' obligations. If not, the entity does not possess sovereign immunity. The *Runyon* decision noted that where an entity is organized under state law as a non-profit corporation, the corporate shield would, in most cases, shield the tribes from any liability as a matter of law.[42] Consequently, none of TCC's member tribes would be bound or liable for any judgment against TCC, since it is a corporation organized under State law. *Id.*, at 441. As a consequence, the member tribes are not the real parties in interest, and the corporation does not possess the Tribe's sovereign immunity. New York follows a rule in accord with *Runyon*. *See Sue/Perior Concrete & Paving v Lewiston Golf Course Corp.*, 25 N.E. 3rd 928, 935 (N.Y. 2014)

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[42] See *Runyon, supra.*

Of course, *Runyon* is controlling precedence before this Court, and applying *Runyon* to this litigation would result in a conclusion that the member tribes – as well as the non-tribal members of TCC -- are not responsible for any money judgment against TCC and are not the real parties in interest. Moreover, this case is not a case seeking a money judgment; it is seeking declaratory and injunctive relief. The lack of a money judgement claim further suggests that the tribes are not the real parties in interest.

Since TCC's member tribes are not the real parties in interest, TCC would not be able to assert a sovereign immunity defense under *Runyon.*

b) Other Considerations Under *Runyon.* The "real party in interest" analysis in *Runyon* is a threshold question *albeit* determinative. Beyond this threshold question, however, other considerations under *Runyon* would presume an absence of sovereign immunity.

In *Runyon* the membership in the regional non-profit corporation was comprised exclusively of tribes, which differs from TCC. This fact alone eliminates the sovereign immunity defense for TCC.

Moreover, under *Runyon,* if the tribe(s) are found to be legally responsible for TCC's obligations, the Court must further consider how much control a tribe(s) exercise over the entity, and whether the entity is engaged in commercial or governmental work.

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84 P.3d 441. Applying these factors to TCC would also mean that TCC does not have sovereign immunity.

As noted above, the membership of TCC is not comprised exclusively of Tribes, which clearly is equivalent to a diminution of tribal control. Tribal status is irrelevant in TCC's membership eligibility. Rather, membership is determined based upon whether the entity is a village or an urban Native group. In many cases, the tribe is the governing body of the Native village, but this is not always the case. The villages of Lake Minchumina, Medfra, and Canyon Village are members of TCC,[43] but are not federally recognized Tribes and are not governed by a federally recognized tribe.[44] Equally, the two "urban Native groups" - the Fairbanks Native Association, and Tok Native Association --- are members of TCC,[45] but are not federally recognized Tribes.[46] As a result, TCC cannot be considered a "arm of the tribe(s)" because five (5) members are not federally recognized Tribes. And those members of TCC that are Tribal entities are not members because they are tribes. Rather they are members because they are "villages". TCC cannot be considered an arm of the tribes if tribal status is irrelevant to the village's participation. Merely because a Tribe might join the Chamber of Commerce does not transform the Chamber into an arm of the Tribe.

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[43] See https://www.tananachiefs.org/about/communities/
[44] Fed. Reg. Vol. 83, p. 34863 (July 23, 2018) (See https://www.gpo.gov/fdsys/pkg/FR-2018-07-23/pdf/2018-15679.pdf)
[45] See https://www.tananachiefs.org/about/communities/
[46] Fed. Reg. Vol. 83, p. 34863 (July 23, 2018) (See https://www.gpo.gov/fdsys/pkg/FR-2018-07-23/pdf/2018-15679.pdf)

As noted above, TCC's assertion that the Tribes control TCC might be true if TCC followed its bylaws and there was not a split between the tribes resulting in a question being decided by the non-tribal members. However, TCC does not follow its bylaws. The affidavits of Mr. Carl Burgett (Chief of Huslia, TCC Director and member of TCC's Executive Board), Mr. P.J. Simon (TCC's President) and the statement by the Louden Tribe demonstrate a pattern of calling special meetings without proper notice, ejecting TCC E-Board members from E-Board meetings, with the consequent effect of prohibiting such Directors from participating in the E-Board meetings.[47] Mr. Carl Burgett Second Affidavit also documents that twelve (12) Directors did not call for the December 15, 2021 Special Full Board meeting, but that the meeting was held anyway.[48] Ms. Tracy Charles, President of Dot Lake and a TCC Director documents that she attempted to obtain and verify Mr. Burgett's claims by requesting copies of the alleged Directors' call for the December Special Board meeting, but was denied copies of the alleged Director's call for the Special meeting.[49] Ms. Georgianna Madros, Chief of Kaltag and a TCC Director confirmed that it was reported that Kaltag was one of the villages calling for the Special November and December Full Board meetings, but that neither her nor her tribe requested either meeting, and did not request a meeting to recall PJ Simon.[50] Mr. Burgett's and Ms. Madros document that Healy Lake's Director (and Tribal President)

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[47] See Aff't of Carl Burgett (Plt. Ex. 6 & 7) and Aff't of PJ Simon (Plt. Ex. 10)
[48] See Aff't of Carl Burgett 2nd(Plt. Ex. 7) Louden Tribe Statement (Plt. Ex. 11)
[49] See Aff't of Tracy Charles (Plt. Ex. 9)
[50] Aff't of Georgianna Madros (Plt. Ex. 8)

was ejected from the December meeting denying her the right to participate in the meeting.[51] Mr. Burgett also documents that Chief Green, Chief of Louden Tribe (Galena) and a TCC Director was denied the right to vote on the recall of PJ Simon in the December Special meeting.[52] And of course, Mr. Burgett confirms that twenty-two (22) votes were cast to recall PJ Simon which falls short of the 2/3 majority vote requirement under the TCC bylaws.[53] All of these actions were taken by Ms. Charlene Stern,[54] TCC's former Vice-President, who is neither a Chief/President of any Tribe, nor an appointed Director of any tribe. Given that Ms. Sterns and her lawyers[55] were affirmatively lying to the Tribes, ignoring their requests for information, ejecting Directors from meetings and denying Tribal representatives (Directors) a vote in critical matters where the Directors disagreed with Ms. Sterns and her staff, it is impossible to demonstrate that TCC is controlled by its member tribes.

IV. TCC DOES NOT POSSESS SOVERIEGN IMMUNITY UNDER *WHITE*

a) *Stare Decisis* Obligates This Court To Follow *Runyon* Rather Than Decisions From Other Jurisdictions. Rather than citing the binding Alaska Supreme Court precedence of *Runyon*, TCC advances alternative tests as sovereign immunity

[51] Id., and Aff't of Carl Burgett 2nd (Plt. Ex. 7)

[52] Id.,

[53] Id. As noted, there are forty-five (45) members of TCC Board of Directors, meaning that the 2/3 requirement for recall would require thirty (30) affirmative votes to recall the President.

[54] Id.

[55] It is disputed as to whether these lawyers represented TCC or just Ms. Sterns. Mr. PJ Simon dismissed these lawyers with regard to governance issues, but they were retained by Ms. Sterns. Aff't of PJ Simon (Plt. Ex. ---). Remarkably, Ms. Patterson actually appeared before the TCC E-Board and offered the legal opinion that the Board could meet without the requisite notice in order to reinstate her duties to advise the "Board" on governance issues. Id.

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used in Federal Courts.[56] This Court should decline to follow this alternative authority because it is required to disregard the cited precedence from other Court's and follow the Alaska Supreme Court's holding in *Runyon*. The Alaska Supreme Court has clearly held that the doctrine of "Vertical *stare decisis* requires that courts of lower rank follow decisions of higher courts" and "lower courts generally cannot overrule decisions of higher courts[.]" *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 43-44 (Alaska 2007); *Accord State v Seigle*, 394 P.3d 627, 633 (Ak Ct. App., 2017) (It would create chaos in our legal system if these courts were not bound by higher court decisions." *Citing Auto Equity Sales, Inc. v. Super. Ct. of Santa Clara Cty.*, 57 Cal.2d 450, 20 Cal.Rptr. 321, 369 P.2d 937, 939-40 (1962)). Thus, were the Alaska Supreme Court has decided a legal matter, the Superior Court is obligated to follow the Alaska Supreme Court's holding, even in the face of contrary holding in other jurisdictions. It is possible that the Alaska Supreme Court overturns *Runyon,* however, until that happens the question of TCC's sovereign immunity is governed by *Runyon* in this Court.

b) TCC Does Not Have Sovereign Immunity Pursuant to the *White* Test.

Even if this Court were free to overturn *Runyon* and follow *White,*[57] TCC could not meet the *White* test to support a finding of sovereign immunity on the facts of this case and the record.

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[56] See TCC Memo, at 6 et. seq., citing *White v Univ. of Cal.*, 765 F.3d 1010 (9th Cir., 2014)
[57] *White v Univ. of Cal.*, 765 F.3d 1010 (9th Cir., 2014)

As TCC notes, *White* articulates a multi-factor test: (1) the method of the entities creation, 2) the entities purpose, 3) whether the tribe exercises control over the entity, 4) the Tribe's intent to delegate sovereign immunity to the entity, 5) the financial relationship between the tribe and entity.[58] However, TCC fails to explain which party has the burden of proof under the *White* test.

i) Burden of Proof. *White* does not address the issue as to who has the burden of proof where a tribally affiliated entity is at issue. Of course other courts using the test have. While a tribe's immunity is presumed if it appears on the list of federally recognized tribes, a tribally affiliated entity claiming immunity bears the burden of proving by a preponderance of the evidence that it is an arm of the Tribe. *Williams* v. *Big Picture Loans, LLC* , 929 F.3d, 170, 176 (4th Cir., 2019) ["Unlike the tribe itself, an entity should not be given a presumption of immunity until it has demonstrated that it is in fact an extension of the tribe. Once [an entity] has done so, the burden to prove that immunity has been abrogated or waived would then fall to the plaintiff."] *See also, Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort* , 629 F.3d 1173, 1187 n.17 (10th Cir. 2010); *Gristede's Foods, Inc.* v. *Unkechuage Nation*, 660 F. Supp. 2d 442, 465 (E.D.N.Y. 2009), *Cash Advance & Preferred Cash Loans* v. *State ex rel. Suthers* , 242 P. 3d 1099, 1113-14 (Colo. 2010); *Great Plains Lending v Dep't of Banking*, 259 A.3d, 1128, 1138-40 (Conn. 2021). In this case, TCC has not seriously presented evidence as to the multi-factor *White* test. However, a

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[58] TCC Memo, at 6

preponderance of the evidence before the Court demonstrates that TCC is not an arm of the tribe(s) considering the *White* factors.

ii) Creation By Tribe(s). In considering the first *White* factor - the method by which TCC was created --- TCC merely argues that the "villages" created TCC, with the misleading inference that the "villages" were "tribes".[59] A careful reading of TCC motion, however, reveals that TCC does not argue that TCC was created by Tribes. Of course, an assertion that TCC was created by Tribes is simply historically not true, as demonstrated above. It was originally created by individual Native people, and later incorporated by three individual Native people shortly prior to ANCSA.[60] And of course, the Interior Athabascan tribes were not federally recognized prior to ANCSA. There is nothing in the history of TCC which would suggest that tribes created or incorporated TCC.

iii) Purpose. With regard to the second *White* factor, TCC argues that "TCC's explicit purpose in incorporating was for tribal purposes."[61]. This is simply not true. TCC was incorporated in order to implement ANCSA; i.e. to be an "existing Native association that could incorporate Doyon, which was to receive land and cash under the terms of ANCSA.[62] If anything, the purpose of incorporating TCC was for the for-profit corporate purpose of creating Doyon and implementing ANCSA. Even today, the

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[59] TCC Memo, at 9
[60] See Section II(a) above.
[61] TCC, Memo at 9-10
[62] See Section II(a) above.

purposes articulated in TCC Articles of Incorporation do not mention the word "tribe". Rather, TCC's Articles of Incorporation explicitly state that TCC is "organized **exclusively** for religious, charitable, scientific, literary or educational purposes within the meaning of Section 501 (c) (3) of the Internal Revenue Code."[63] (emphasis added) According to its organizational documents, TCC is not organized for "tribal purposes" or to perform "tribal governmental functions"; rather it is organized for charitable purposes.[64]

iv Tribal Control. TCC argues that its structure of ownership and management is entirely controlled by tribes.[65] This is not correct, and, on this point, this case is clearly distinguishable from *White*. In *White* the entity was "composed solely of tribal members, who act on its behalf."[66] Of course, that is not the case with TCC, which has six (6) non-tribal entities who are full voting members and have Directors.[67] TCC's argument is overly nuanced as TCC explains that TCC is controlled by tribes but reports that "villages" (i.e. not tribes) and Native individuals' control TCC.[68] The nuance is the presumption that the terms "village" and "tribe" are synonymous, which is not true. It is clear that the TCC members who are unrecognized villages and the urban Indian groups are not tribes. The truth is that TCC is controlled by villages –

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[63] See TCC Restated Articles of Incorporation and Bylaws (Def. Ex. A – 2nd) at Articles, Art. III (j)
[64] *Fairbanks North Star Borough v. Dena Nena Henash,* 88 P.3d 124 (Alaska, 2004); *Dena Nena Henash v. Fairbanks North Star Borough* 265 P.3d 302 (Alaska, 2011)
[65] TCC Memo at 10
[66] *White, supra, at 1025*
[67] Supra, at Sec. II(a)
[68] TCC Memo, at

some of which are tribes but some are not. This is not the same as saying that TCC is "composed solely of tribal members," nor that tribes necessarily control TCC.

The second part of this portion of the *White* test is that the tribal leadership of the entity act on behalf of the Tribe. In TCC's case, Directors do not "act on behalf" of their tribes. TCC has provided a copy of the TCC Board of Directors Code of Ethics , which is crystal clear that Directors owe a duty of "Due Care" and "Loyalty" to TCC; not their tribes.[69] A Director may be sanctioned for violation of the ethics policy even if they act in the interest of their tribes if that action conflicts with the best interest of TCC as a corporate organization.[70] As TCC admits, this Code of Ethics is used by TCC to sanction Directors.[71] As noted by the Louden Tribe, this Code of Ethics was used to deny Louden's Chief/Director Green the right to vote at the Special Full Board meeting to recall Mr. P.J. Simon.[72] Such sanctions could include ejecting Directors from meetings and otherwise denying their participation in TCC decision-making, such as complained about in Dot Lake's complaint. As noted above, TCC could prove that it is controlled by the Tribes if TCC actually followed its Bylaws, however, the evidence in the record is that TCC does not follow its bylaws by ejecting tribally appointed Directors from meetings, denying tribally appointed Directors the right to vote on matters coming before the Board, and conducting meetings and recall votes in a manner

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[69] TCC Memo, Exhibit B, at pp 3-4
[70] Id., at p. 11
[71] See Aff't of Robin Brown, p. 2 (unmarked exhibit attached to TCC Memo)
[72] See also, Louden Letter Plt. (Ex. 11)

clearly violative of the TCC Bylaws.[73] In this sense, TCC does not meet the *White* example as to what constitutes an "arm of the tribe", which requires that the Directors be "composed solely of tribal members, who act on its (the tribe's) behalf."

v) Intent. As to the fourth *White* test, the repurposing of TCC after initial ANCSA implementation would suggest that there was no intent to delegate sovereign immunity to TCC. The selection of a state chartered non-profit corporation necessarily implies the applicability of A.S. 10.20.011(2), which provides that such state chartered non-profit corporations , can "sued and be sued". Of course, Tribes seeking to use TCC for ISDEAA contracts/compacts might clarify that this necessary implication does not apply to TCC by delegating the tribes' sovereign immunity to TCC when the Tribe authorized such contracts/compacts. Of course, that did not happen. Dot Lake's 1994 resolution is typical in that it merely authorizes TCC to compact, but does not invest TCC with any sovereign powers, including sovereign immunity.[74] Any doubt on this point is clarified in Dot Lake's 2022 Resolution which states that it never delegated sovereign immunity to TCC, and that the Tribe was not aware that any other Tribe did so.[75] TCC makes no argument nor offers contradictory evidence that the Tribe's intended to delegate sovereign immunity to the TCC.

TCC argues that TCC was vested with rights of the historic Tanana Chiefs Conference, the traditional consultive and governing assembly of the Athabascan

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[73] See Sec. II(f) supra.
[74] See 1994 Dot Lake Resolution authorizing TCC to Compact (Plt. Ex. 3)
[75] See 2022 Dot Lake Resolution (Plt. Ex. 4)

people."[76] The problem with this is that there never was such a regional governing assembly. Rather Athabaskan Tribes have always been organized at the band level. Indeed, when Judge Wickersham wanted to meet with the Chiefs, he could only meet with six (6) Tanana River Chiefs.[77] And not all Athabascan villages met at Tanana; rather they conducted trade at various locations.[78] TCC offers no evidence that a regional Athabaskan tribe existed primordially. Today, there are thirty-seven (37) federally recognized Tribes within the TCC region, and all are organized at the village level.[79] The evidence is that the Tribes of the region authorized TCC to contract with the IHS and BIA to operate federal programs benefiting Native people because of their status as Indians. But there is no evidence that any of the Tribes in the region delegated to TCC any sovereign powers or sovereign immunity.

vi) Financial Relationship. Finally, TCC argues that the financial relationship between the tribes and itself "weighs heavily in favor of sovereign immunity" based solely upon the fact that TCC contract/compacts for some tribes in the Interior under the ISDEAA with the BIA and the IHS.[80] However, ISDEAA programs are not tribal

[76] TCC Memo, at 10
[77] See Sec. II(a) supra.
[78] Id.
[79] Compare Id., and Fed. Reg. Vol. 83, p. 34863 (July 23, 2018) (See https://www.gpo.gov/fdsys/pkg/FR-2018-07-23/pdf/2018-15679.pdf) The appearance of a TCC member on this latter list is determinative of federally recognized tribal status. See *John v. Baker,* 982 P.2d 738 (Alaska 1999). There is a rather curious exception in this regard, in that List of Tribes contains Village of Venetie, Native Village of Venetie Tribal Government, and Arctic Village. Only two of these tribes are members of TCC – i.e. Village of Venetie and Arctic Village. The Native Village of Venetie Tribal Government is a federally recognized tribe but not a member of TCC. Thus, it may be said that not all Tribes within the TCC region are members of TCC.
[80] TCC Memo, at 11

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programs; rather they are BIA and IHS programs which TCC operates under contracts or compacts with those federal agencies.[81] There is no evidence that any tribe has contracted, compacted or entered into a cooperative agreement with TCC to run purely tribal programs. There is no evidence that any tribe or group of tribes provided TCC with start-up funds or invested tribal funds with TCC. As one commentor stated, "TCC does operate several programs which provide government-like services, it might be considered a quasi-governmental organization.... TCC does not exercise jurisdiction over territory, pass laws, or possess other attributes of Indian sovereignty."[82] (emphasis added) Of course the term "quasi" "is used in legal phraseology to indicate that one subject resembles another, with which it is compared, in certain characteristics but that there are intrinsic and material differences between them."[83] There is no question that TCC operates federal government programs. Equally, there is no question that TCC does not operate Tribal programs. While TCC is a quasi-tribal governmental organization, there is no authority that a "quasi-tribal governmental organization" is an arm of the tribe(s) under the *White* test.

This distinction is acknowledged in TCC's memo when it admits that *White* did not involve ISDEAA contracts.[84] *White* dealt with a tribal entity operating a tribal program facilitating the repatriation of tribal human remains and artifacts.[85] Similarly

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[81] See 25 USC §5321(a)
[82] Case, at Chap. 9, §IV(B)(5) (p. 345)
[83] BLACKS LAW DICTIONARY, at 1410 (Rev. 4th Ed.)
[84] TCC Memo, at 11
[85] *White*, supra. at 1015-1016

Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort , dealt with the tribal subsidiary operating a casino.[86] While TCC cites cases dealing with ISDEAA contracts, the cases are clearly distinguishable because the entity asserting sovereign immunity is either a federally recognized Indian tribe, (not a state chartered non-profit corporation),[87] or a unique federally created entity.[88]

Under the *White* analysis the entities financial relationship is not determinative as under *Runyon.* However, it is a significant factor, and as the Court in *Runyon* noted, the fact that TCC is organized as a state chartered non-profit corporation means, that as a legal matter, TCC's member tribes are not responsible for the debts of TCC, including any liability that might arise from a lawsuit. While not determinative under *White*, this fact, when considered in with all the other *White* factors, clearly weighs heavily against a finding that TCC possesses sovereign immunity.

V. ANY DEGREE OF SOVERIEGN IMMUNITY POSSESSED BY TCC DOES NOT PRECLUDE SUIT BROUGHT BY DOT LAKE VILLAGE

[86] *Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort* , supra., at 1176. See also *Cash Advance & Preferred Cash Loans* v. *State ex rel. Suthers* , 242 P. 3d 1099, 1113-14 (Colo. 2010); *Great Plains Lending v Dep't of Banking,* 259 A.3d, 1128, 1138-40 (Conn. 2021) both dealt with Tribal entities engaged in loaning tribal money.

[87] [87] E.g. *Douglas Indian Association v Central Council,* 403 P.3d 1172, 1181 (Alaska, 2017) involved a dispute between two federally recognized tribes. The regional situation in Southeast Alaska differs dramatically from the TCC region, in that the Central Council of Tlingit and Haida Indians is a federally recognized tribe. See Fed. Reg. Vol. 86, p. 7554 (Jan. 19, 2021) The situation in *Matyascik v Arctic Slope Native Association, Ltd.* 2019 WL 3554687 (U.S. District Court) is more complex in that the Inupiat Community of the Arctic Slope is a regional IRA tribal government, for which ASNA contracts. See Fed. Reg. Vol. 86, p. 7554 (Jan. 19, 2021)This is very different than found in the TCC region which does not have a regional tribal government similar to that found on the Arctic Slope.

[88] TCC refers to two cases involving the Alaska Native Tribal Health Consortium, which is a very unique entity in that it was created by special federal legislation and authorized to compact to operate IHS services without any tribal authorization. See P.L. 105-83 , § 325.

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There are a number of exceptions to the doctrine of sovereign immunity that would apply in this case.

A) Superior Sovereign Exception To Sovereign Immunity. Assuming that TCC possesses sovereign immunity as a "arm of the tribe", that immunity would not bar a suit brought by a tribe, which is a superior sovereign. This is an unusual case in that a federally recognized Indian tribe has brought suit against an entity that claims immunity because it claims to be an arm of that tribe. If TCC has sovereign immunity, it can only have been delegated such immunity from the tribe and is therefore a "dependent sovereign" of the Tribe. However, as a general matter, sovereign immunity does not bar a suit brought by a superior sovereign against a dependent sovereign.

In *U.S. v Red Lake Band of Chippewa Indians*, 827 F. 2d, 380 383 (8th Cir. 1987) the Court held that "a state may not assert sovereign immunity as against the federal government, neither may an Indian Tribe, as a dependent nation, do so." Citing *U.S. v Mississippi*, 380 U.S. 128, 140-41 (1965) In reaching this decision, the Court followed the Ninth Circuit by stating,

> In *United States v. White Mountain Apache Tribe*, 784 F. 2d 917, 920 (9th Cir. 1986), the Ninth Circuit held that "the Tribe's own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers." This principle was later cited by the same court in *United States v. Yakima Tribal Court*, 806 F. 2d 853, 861 (9th Cir. 1986) (Yakima), cert. denied, ___ U.S. ___, 107 S.Ct. 2461, 95 L.Ed.2d 870 (1987), in support of its holding that the United States could sue and override a tribe's sovereign immunity just as it could sue and override a state's sovereign immunity

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See also *Miccosukee Tribe of Indians v U.S.*, 730 F. Supp. 2d 1344 (S.D. Fla., 2010) *citing Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F. 3d 1126, 1135 (11th Cir. 1999) (quoting *Reich v. Mashantucket Sand Gravel*, 95 F.3d 174, 182 (2d Cir. 1996)); *Quileute Indian Tribe v Babbitt*, 18 F.3d 1456, 1559-60 (9th Cir. 19940); *National Labor Relations Board v Little River Band of Ottawa Indians*, 788 F.3d 537 (6th Cir., 2015); *In re Grand Jury Proceedings*, 744 F.3d 211 (1st Cir. 2014) As the Court in *Miccosukee Tribe* noted,

> In other words, despite the absence of an explicit tribal immunity waiver, tribes cannot assert immunity in such actions because the enforcing party would be the United States — i.e., a **"superior sovereign" not subject to the defense of tribal sovereign immunity.** *See id.* (quoting *Babbitt*, 18 F. 3d, at 1459-60.

Miccosukee Tribe of Indians of Florida v. U.S., 730 F. Supp., 1348-49 (emphasis added)

In this case, there is no question that Dot Lake Village is the "superior sovereign" to TCC in that TCC is claiming that it derives its sovereign immunity from its status as an arm of the tribe. As a result, the "superior sovereign" exception to the doctrine of sovereign immunity would apply to allow the Tribe's suit to proceed.

B) The Tribes Constitutional Right To Access To The State Courts. The notion that a tribe may not have access to a State court to seek redress against an arm of that tribe violates the Tribes right of access to State Courts. In *Three Affiliated Tribes of Fort Berthold Reservation v Wold Engineering*, 467 U.S. 138 (1984), the Court held that Tribes have a right to access State Courts and present claims to State courts respecting their claims. In that case, an Indian tribe brought suit against an engineering firm for

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negligence in design and construction of a water system for an Indian village located entirely within boundaries of Indian reservation. The matter was dismissed by the State Courts for lack of subject matter jurisdiction under a state law provision that required that a tribe may only have access to state court if the Tribe waives its sovereign immunity as to all civil actions that may arise.[89] The U.S. Supreme Court held that such a condition was contrary to a Tribes rights of self-government, which includes the Tribe's right to elect to have its disputes heard in State Court.[90] Thus, it is clear that Tribes not only have the capacity to sue and present claims against others, but that they have a right to access State Courts to present such claims.[91] To suggest that a subdivision of a tribe may elect to unilaterally override the Tribe's decision to bring suit in State court unduly burdens the Tribe's sovereign right to order and govern its affairs, which includes the right to seek resolution of its disputes in State Court.

C) Waiver of TCC's Immunity. There is no question that Tribes have the power to waive their sovereign immunity. [92] Whether a tribe has waived its sovereign immunity is a matter of tribal law.[93] As discussed above, there is no evidence that the tribe has delegated sovereign immunity to TCC, however, Dot Lake has clarified that it

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[89] Id., at 890
[90] Id., at 891

[91] *See* Catherine T. Struve, SOVEREIGN LITIGANTS: NATIVE AMERICAN NATIONS IN COURT , 55 Villanova L. Rev. 929, 956-959 (2004).

[92] COHEN, *supra, at §7.05(1)(c)*
[93] Id.

has never delegated sovereign immunity TCC, but if the Tribe inadvertently delegated such immunity to TCC, it waives such immunity.[94]

D) *Ultra Vires* Exception To Derivative Sovereign Immunity. The complaint alleges that the TCC officials are acting *ultra vires*, which would mean that if TCC did have sovereign immunity, that immunity would not extend to officials acting *ultra vires*. *Douglas Indian Association v Central Council,* 403 P.3d 1172, 1181 (Alaska, 2017). Normally, as with *Douglas Indian Association,* the issue arises with a tribal official asserting sovereign immunity, which only applies where the Tribal official is acting within the scope of their official duties. *Ultra vires* actions – actions taken outside the official's scope of duties, --- are not covered by the tribes' sovereign immunity.[95] This is particularly so when the claims seek declaratory and/or injunctive relief. *Oertwich v Traditional Village of Togiak,* ---- F.3d ---- (9th Cir., 2022). In such cases, the individual person --- as distinct from their status as a tribal official – may be held subjected to declaratory and/or injunctive relief.

Of course, corporations like TCC are legal persons. *Burwell v Hobby Lobby Stores, Inc.* 573 U.S. 682 (2014); See also *Citizens United v Federal Election Commission,* 558 U.S. 310 (2010) Just as a legal person serving as a tribal official may be held responsible for *ultra vires* actions, so may a subsidiary tribal corporate person be held responsible for its *ultra vires* acts.

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[94] See 2022 Dot Lake Resolution (Plt. Ex. 4)
[95] Id.

Of course, TCC's alleged *ultra vires* actions are central to this lawsuit. Specifically, the complaint alleges numerous actions that are *ultra vires* because they violate TCC's Bylaws, such as ejecting Directors from meetings, failing to provide Directors with adequate notice, denying Directors the right to vote or otherwise participate in meeting.[96] TCC's actions that clearly violate TCC's Bylaws are *ultra vires,* and constitute an exception to the doctrine of sovereign immunity that would allow suit for declaratory and injunctive relief.

CONCLUSION.

This Court is bound to follow *Runyon* decision which holds that the organization of an entity under state corporate law precludes the member tribes from being responsible for any judgment that may occur. As a consequence, this Court should deny TCC's motion.

Alternatively if this Court is inclined to consider TCC's proposed *White* multi-factor test, this Court should also deny TCC's motion because a preponderance of the evidence before the Court demonstrates that TCC was not created by tribes for a tribal purpose, the Tribes do not exercise control over TCC, the Tribe's did not intend to delegate sovereign immunity to TCC, and the tribes are not liable for any liability that TCC may incur from this lawsuit. Moreover, TCC cannot assert immunity against a

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[96] See Complaint.

member tribe, which is a superior sovereign, and the allegations and record in this case raise claims that TCC actions were *ultra vires*. The Court should deny TCC's motion to dismiss.

DATED this 9th day of May, 2022.

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Certificate of Service
I certify that a true and correct copy of the foregoing including a total of 32 pages was served via e-mail message on the 9th day of May , 2022 and believed to be completed without error from JDesrosiers@fairbankslaw.com to:

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